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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDUARDO AROCENA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Eduardo Arocena respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Was the defendant deprived of due process of law when he did not receive a fair trial because there was a partisan interference by the trial judge?

2. Was the defendant deprived of due process of law when he did not receive a fair trial because of ineffective assistance of counsel?

3. Should the trial judge have disqualified himself pursuant to 28 U.S.C. 455(a) when his impartiality had been reasonably questioned because of his partisan interference in the trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit Court of Appeals whose judgment is sought to be reviewed are:

1. The United States of America, Respondent-Appellee represented by the United States Attorney for the Southern District of New York, Otto G. Obermaier.

2. Eduardo Arocena, Petitioner-Appellant represented by Miller, Hochman, Meyerson & Schwartz.

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APPENDICES

A. Opinion of the United States Third Circuit Court of Appeals, dated March 20, 1990 ..... 1a

B. Opinion of the United States District Court for the Southern District of New York, dated and filed September 12, 1989, reported at 721 F. Supp. 528 (S.D.N.Y. 1989) 1b

C. Text of 28, U.S.C. 455a; 28 U.S.C. 2255; United States Constitution Amendment V 1c

OPINIONS BELOW

The decision of the Third Circuit Court of Appeals dated March 20, 1990 affirming the decision of the United States District Court for the Southern District of New York is reproduced as Appendix A. The decision of the United States District Court for the Southern District dated September 12, 1989 denying Eduardo Arocena's petition to vacate his conviction and sentence and denying his related recusal motion is reported as 721 F.Supp. 428 and is reproduced as Appendix B to this petition.

JURISDICTION

The decision of the Third Circuit that affirmed the decision of the United States District Court was entered on March 20, 1990. No application for an extension of time to file a petition for certiorari has been made. This Court's jurisdiction is invoked under 28 U.S.C. Section 2101(e).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH RELATE TO THIS CASE

28 U.S.C. 2255 and 28 U.S.C. 455a and United States Constitution Amendment V, all of which are reproduced as Appendix C of this petition.

STATEMENT OF THE CASE

This petition involves the denial of a 2255 motion seeking to set aside convictions which resulted in consecutive life sentences and thirty five years imprisonment which Eduardo Arocena is now serving.

Eduardo Arocena was convicted in the Southern District on September 22, 1984, after a six week trial. The jury found Arocena guilty on twenty five counts, including first degree murder of a diplomat; two conspiracies to murder diplomats; malicious damage by explosives to property used in commerce, with personal injury resulting; six counts of possession of unregistered bombs; two counts of conspiracy; and perjury before the Grand Jury. Judge Robert J. Ward sentenced Arocena on November 9, 1984, to serve consecutive sentences of life imprisonment and thirty five years imprisonment.

On December 3, 1985, the United States Court of Appeals, Second Circuit affirmed the conviction. Eduardo Arocena filed a 2255 motion to vacate the conviction and sentence. He also filed a motion to have Judge Ward recuse himself from hearing the 2255 motion. On September 12, 1989, Judge Ward issued an opinion denying the motions. On March 20, 1990, the Third Circuit affirmed this order.

At the trial the government presented evidence in an effort to show that Eduardo Arocena was a leader of "Omega 7", an anti-Castro group operating in the United States. The Government contended that Arocena participated in two conspiracies. The Government alleged that Omega 7 was formed by Eduardo Arocena on September 11, 1974, to combat in this country the Cuban regime of Fidel Castro.

In late 1980 the Cuban consulate in Montreal was bombed. A rental car leaving Canada was stopped by the United States border patrol and the two individuals in the car were questioned, Ramon Sanchez from Florida and a man named Pedro Remon. An analysis of Remon's telephone records demonstrated a frequency of calls around the time of Omega 7 acts to Arocena, and to individuals named Losada-Fernandez (Losada) and Andres Garcia. The FBI concluded that there was a pattern of car rentals by these men in proximity to Omega 7 acts.

Special agents of the FBI staked out the National Car Rental branch at Newark Airport. There was testimony that on September 13, 1981, Arocena returned a National rental car, took the shuttle bus to the Eastern Airlines flight for Miami and on the ticket line identified himself as "A. Medina" to purchase a ticket for cash.

In September, 1982, Eduardo Arocena testified before a grand jury in the Southern District that was investigating Omega 7's activities. Thereafter, he allegedly engaged in conversations with FBI agents, which took place in New York and in Miami. Testimony regarding these inverviews September 24 and 29, 1982 was introduced. Eduardo Arocena broke off these conversations on October 1, 1982. A criminal complaint for Arocena's arrest was issued and he was apprehended in Miami on July 22, 1983, removed to the Southern District, and incarcerated in the federal penal facility in Otisville, New York.

The Government produced testimony that after a surveillance of the Cuban Mission, Arocena and three other persons, Remon, Garcia and Losada observed Ambassador Roa's car double parked outside the Mission. Remon placed a remote control bomb fixed with magnets to the gas tank of the Ambassador's car; the bomb had earlier been transported by Arocena and Remon from New Jersey. The four followed Ambassador Roa's car to his residence on East 81st Street. The chauffeur pulled up to the front of the residence, attempted to pull into a parking spot, and bumped into another car. When that occurred, the bomb fell off the gas tank and landed on the ground.

The Ambassador and the chauffeur left the car and pointed to the bomb. Remon urged Eduardo Arocena to set off the bomb, but Arocena refused because there were children nearby. According to the Goverment's proof, Arocena wanted to abort the plan because he was disappointed that Garcia had not picked up other Cubans. Eduardo Arocena learned a few hours later that Remon had nonetheless machine gunned Garcia to death with a weapon earlier given to him by Arocena. The Government's proof relating to the bombing of the Cuban Mission showed that late on the evening of December 28, 1978, a high level explosive took place at the Cuban Mission, detonated by a pocket watch timing mechanism.

Eduardo Arocena was charged with placing a high level explosive aboard a Trans World Airlines ("TWA") flight departing from JFK International Airport to Los Angeles on March 25, 1979. In support of such charges the Government adduced proof that Arocena was angered that TWA had contracted airplanes to fly to Cuba, he and Remon went to JFK, purchased a ticket in a fictitious name and checked in a Samsonite briefcase containing a high level time bomb which was not intended to explode – merely as a "scare tactic". However, when he found out the bomb was in fact going to explode, Eduardo Arocena directed Remon to make phone calls along Queens Boulevard notifying the terminal, TWA and the police that there was a bomb aboard the flight. The bomb nevertheless exploded, causing extensive damage.

The Government introduced evidence which it contended showed that Arocena, Remon, Andres and Garcia and Losada conspired together to commit the bombing of the Cuban Mission to the United

Nations. Remon had placed the high level explosive near the Mission, while Arocena and Losada acted as lookouts.

The Government adduced proof which it contended showed that Arocena, Remon, Garcia and Losada carried out the bombing of the Soviet Mission on December 11, 1979. During the change of sentries, a high level explosive was placed near the Mission. The bomb went off, causing substantial damage.

Counts 19 and 20 of the indictment charged Arocena with bombing. The Government adduced evidence which showed that only Remon and Garcia were involved in a bombing of the Aeroflot ticket office in New York on January 13, 1980. The bomb was placed in front of Aeroflot by Remon; Garcia served as his back up and driver. After the bomb was placed, Remon shot at a police officer nearby – missing him; Arocena reprimanded Remon for the shooting incident.

The Government adduced proof that showed that Arocena and other person had been surveilling the Mexican consulate on East 41st Street from the steps of the public library. Eventually, the bomb was placed in the doorway to the consulate; it exploded causing damage.

The Government adduced proof of a separate conspiracy in which Arocena participated. This "conspiracy" allegedly consisting of Arocena, Manny Fernandez, Mazim Lora, Gerardo Necuze and Justo Rodriguez, allegedly engaged in a pattern of racketeering activity in the Miami area, including bombings, arson, extortion, drug dealing and acts of violence. The proof relating to the Miami conspiracy was drawn principally from the testimony of Arocena's alleged confederates.

The Government's proof relating to the perjury charge consisted of testimony by FBI agents that Arocena's testimony before the Southern District grand jury was untrue. The Government adduced evidence principally to show that Arocena contacted alleged members of Omega 7 about their grand jury testimony and requested that they protect him.

In his testimony, Arocena denied the accusations of the indictment and refuted the testimony of the principal witnesses called by the Government.

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Deprived of Due Process of Law When He Was Denied a Fair Trial By Partisan Judicial Interference.

Although a court may actively manage a proceeding, it must never distort or add to the evidence. *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir. 1988); *United States v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977); *United States v. Fernandez*, 480 F.2d 726, 738 (2nd Cir. 1973) quoting *Quercia v. United States*, 289 U.S. 466, 470, 53 S.Ct. 698, 699 (1933). The court must deal evenhandedly with the adversarial forces of the defense and prosecution. It must not allow even the "appearance" of partisan intervention. *United States v. Pisani*, 773 F.2d 397, 402 (2nd Cir. 1985); *United States v. Fernandez*, 480 F.2d 726, 738 (2nd Cir. 1973). Contrary to these guidelines, the present court intervened in the examination of witnesses eliciting new evidence and distorting testimony to favor the prosecution's position. The court's participation displayed partisanship in fact and appearance. In addition, the record demonstrated that the prosecution was able and well-prepared, thus the court's frequent intervention was unnecessary and improper.

An official opinion of guilt is indicative of prejudicial behavior. *United States v. Bland*, 697 F.2d 262, 266 (8th Cir. 1982). In *Bland*, the trial court's comments suggested a belief in the defendant's guilt. Although the improper remarks were not issued until after the jury verdict was returned, the reviewing court reasoned that the commentary was indicative of the official attitude during trial. *Id.* The present comments are more offensive because they were issued during the trial and in conjunction with an instruction to expedite the remainder:

> "I think, as a matter of fact, Mr. Arocena is wise enough to know the reason he is here. I believe him to be an intelligent person. So I think he knows why he is here, and I think he knew, as he talked to Agent Wack,—and I got this distinct impression—he knew sooner or later he would be in a courtroom. He knew sooner or later he would be before a Judge. And I think he knows that sooner or later he will have to deal with a problem that he created.

> His motives, which I know he believes to be those of a patriot – and I am not quarreling with his motives – his motives are not relevant in connection with the charges before this Court...
>
> Let me suggest this. I was hoping to shorten the trial...
>
> My comments were to encourage you to move the case to a prompter disposition, because I think matters are pretty clear now. Mr. Arocena doesn't see it. He may see it when he sits down and reviews, as I have, the many pages of notes that I have of the last two and a half weeks." (A72-76)

Although these remarks were made outside the presence of the jury, they evince the court's attitude during the trial. As noted in *United States v. Parodi*, 702 F.2d 768, 776 (4th Cir. 1983) evidence in the record "that might indicate a belief on the judge's part that the defendants were "guilty" is particularly relevant in determining whether official conduct is improper. These comments reflect the court's partisanship and the atmosphere of hostility toward the defendant generated by his interference. At the time these remarks were made, the length of the trial had been determined by the prosecution; there was no protracted or dilatory cross-examination. Consequently, the court's suggestion to the defense to shorten its presentation in conjunction with a declaration of the defendant's guilt was arbitrary and improper. Further, the implication from the statement of guilt was that, the outcome having already been decided, a thorough defense would be wasteful. Subsequently, the defense presented was extremely short and ill-conceived. A trial court's statement to expedite the proceedings must be directed fairly at both advocates. *United States v. Johnson*, 657 F.2d 604-06 (4th Cir. 1983). The present court acted outside of the limits of judicial propriety.

Judicial antagonism toward counsel destroys the impartial atmosphere of the courtroom. *United States v. Pisani*, 773 F.2d 397, 403 (2nd Cir. 1985); *United States v. Nazzaro*, 472 F.2d 302, 311-12 (2nd Cir. 1973). Admonishments to counsel should be made outside the jury's presence. *United States v. Baresh*, 790 F.2d 392, 402 (5th Cir. 1986); *United States v. Worthington*, 698 F.2d 820, 827 (6th Cir. 1983); *United States v. Coke*, 339 F.2d 183, 185 (2nd Cir. 1984).

The court denigrated defense counsel's ability in response to an objection to the introduction of a photograph of defendant taken on the day of his arrest: (A127)

The Court's predicate served no legal function. The comment served only to communicate to the jury the trial judge's attitude that defense opinions do not "count."

The Court commented adversely on the quality of the defense case presentation. During the cross-examination of Justo Rodriquez-Montenegro and in response to a prosecutorial objection, the court stated "(f)or some reason, (defense) counsel wants to get it in, and it is beyond me, but I will allow it." (A128) The criticism improperly negated any benefit of allowing the question to stand.

The court accused the defense of bad faith tactics, attacking counsel's credibility".

> "The Court: I don't think at this point it (defense questions) is relevant to the case, and I do not believe that it goes to his credibility. In fact, it does not appear at this point that the questions are attacking his credibility but rather are to elicit information which is not relevant to the issues before this jury. . .
>
> Mr. Fernandez: Your Honor, I believe the testimony was that there were sixteen years of incarceration. I believe the door has been opened to what went on during those sixteen years. . .
>
> The Court: You may proceed, Counsel.
>
> Mr. Fernandez: I believe that we should meet at the side bar.
>
> The Court: There is no reason to meet at the side bar. Please confine your inquiry to matters that are relevant.
>
> Mr. Fernandez: Will the reporter mark where I was?
>
> The Court: I know where you are. I would like to know where you are going. Go on. Next question. Comments such as you just made are totally inappropriate, and you know it. (A129-130)

The hostile treatment was especially unwarranted considering the complete cooperation of defense attorney Fernandez, reflected in the record. Immediately following the prejudicial remark, he stated that grounds for his line of questioning. Defense counsel further attempted to facilitate communication with the court by requesting a side bar (A129-130)

The trial judge indicated that the defense was unprepared by instructing counsel to spend recess reviewing its presentation.

> The Court: Perhaps during the luncheon recess you can review the matter further and of course deal with the matter that you deem to be important.
>
> Mr. Aguilar: Yes, your Honor.
>
> The Court: Not that you have not up to now. I know that you will consider the scope of your examination during the luncheon recess. (A53)

The prosecution did not object to the relevance of the examination. The court could have avoided any prejudice by issuing the statement a moment later, after the jury was excused for lunch.

The trial judge displayed impatience with defense counsel on numerous occasions. During the cross-examination of Barry Mawn and in response to defense attorneys statement that he had "three more questions," the court replied:

> I am always skeptical when a lawyer says, I have one or two more questions. I am sure the jury has started to develop a similar approach. (A45)

The court's declaration did not challenge the propriety of the cross-examination, but rather signalled impatience with the defense. The statement, further, urged the jury to "develop a similar approach" FBI agent Mawn was an important witness. He alleged that the defendant confessed to the commission of numerous felonies. The intimidating remark, aimed one-sidedly at the defense, may have caused counsel to cut short this critical exam.

The court displayed impatience even in sustaining a defense objection.

> Mr. Aguilar: Your Honor, I am going to object to that question. The Government of the United States is so huge, what –
>
> The Court: All right, no speeches. Sustained (A48-49)

The "speech" that the trial judge complained of had encompassed all of twenty words. An impartial response would have simply sustained the objection.

The court contradicted the defense in the jury's presence. The exchange concerned translation of testimony from Spanish to English by an official interpreter. At one point during the translation, defense counsel Fernandez heard a witness' response which the interpreter failed to translate. Mr. Fernandez reported this to the court and the court instructed defense counsel to translate the response. The defense refused. The court should not have directed the defense to translate witness testimony. The weight given to testimony would naturally vary depending upon whether an impartial interpreter or an advocate submitted it. Further, the court's open contradiction of defense counsel highlighted official antagonism.

In *United States v. Spears*, 558 F.2d 1296 (7thCir. 1977) the defendant's conviction was reversed because of an official reprimand held in the jury's presence, even though the single exchange was initiated by counsel's misconduct. The present case is far more deserving of reversal. Judge Ward's display of antagonism was repeated and unprovoked. The official admonishments were not sparked by attorney misconduct as in *Spears*.

The present case closely parallels *United States v. Candelaria-Gonzalez*, 547 F.2d (5th Cir. 1977). In *Candelaria-Gonzalez* a conviction on drug offenses was reversed partially for criticizing defense counsel in front of the jury. *Id.* at 297. Similarly, the hostile remarks in the present case came without "prompting or objection" by the prosecution.

As in *United States v. Dellinger*, 472 F.2d 340, 387 (7th Cir. 1972) judicial criticism and impatience, sometimes not associated with any ruling in ordinary course, and sometimes gratuitously added

to an otherwise proper ruling, and nearly always unnecessary, demonstrated partisan treatment of defendant Arocena's conviction.

Determination of witness credibility is exclusively the province of the jury. *United States v. Shulman*, 624 F.2d 384, 388 (2nd Cir. 1980). Judicial intervention that affects witness credibility is extremely prejudicial. *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir. 1988); *United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983). The present court's intervention affected, both, the credibility of the defendant and of numerous witnesses for the prosecution.

Prosecution witness, FBI agent Larry Wack alleged that the defendant had confessed guilt to many of the charges in the indictment. (p.846 et seq.) However, the defendant stated that a large portion of the alleged confession was manufactured by the government agents. (P.2105 et seq.) Upon completion of the prosecution's cross-examination of the defendant, the court assumed questioning in a manner aimed at eliciting admissions to reinforce agent Wack's account.

The Court emphasized that the defendant had trusted agent Wack and that this trust terminated after a certain period of time. The Court, through its questioning, attempted to show that during this period of trust, the defendant made damaging admissions to the agent. The Court also stressed, through its interrogation of the defendant, that it was the defendant's voice which appeared on the tapes. In addition, the Court, through follow up questions to defendant's answers, demonstrated the Court's disbelief in the answer which the defendant had given to the prior question of the Court. (A176-181). "(A) trial judge cannot assume the mantle of an advocate and take over the cross-examination for the government to merely emphasize the government's proof or to question the credibility of the defendant. . ." *United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983). This partisan conduct is not alleviated by the court's subsequent pro forma instruction (A181). Cautionary instructions are not dispositive in determining the propriety of a court's examination of witnesses. *United States v. Mazzilli*, 848 F.2d 384, 389 (2nd Cir. 1988); *United States v. Gunter*, 631 F.2d 583, 587 (8th Cir. 1980); *United States v. Buchanan*, 585, F.2d 100, 102

(5th Cir. 1978). This instruction could not counterweight the court's frequent and adversarial involvement in the case. Even in the jury instructions, the court's disbelief in the testimony of the defendant is conveyed. The defendant, Arocena, of course, denies any involvement in the murder and the conspiracy and also denies that he ever discussed any aspect of the Garcia murder with the FBI." (A176-181)

Two recent cases from the Second Circuit resemble the present court's treatment of the defendant *United States v. Mazzilli*, 848 F.2d 384 (2nd Cir. 1988); *United States v. Victoria*, 837 F.2d 50 (2nd Cir. 1988). In *Mazzilli* the Court of Appeals reversed conviction because the District Court's questioning of the defendant, "imparted a message of skepticism to the jury", concerning the defendant's credibility. 848 F.2d at 388. "The jury cannot be regarded as having freely come to its own conclusions about the defendant's credibility when the court has already indicated, directly or indirectly, that it disbelieves his testimony. *Id.*

In the present case, the court's "message of skepticism" was not limited to the testimony of the defendant as in *Mazzilli*. The official tone imparted skepticism throughout every phase of the trial, from antagonistic treatment of defense counsel to the bolstering of prosecution witnesses' credibility. The official doubt evinced by the questioning of defendant and the highlighting of inconsistency in the jury instruction was especially damaging since Arocena's defense relied on his own testimony.

The court interfered with the cross-examination of prosecution witness shorthand reporter, Steward Nissenbaum. He was called to authenticate a government exhibit and defense counsel limited cross-examination to one question concerning credibility. (A34) On redirect, the court intervened to bolster the witness' credibility. (A36)

The court also attempted to bolster the credibility of prosecution witness mechanic, Pedro Eduardo Vivar. The witness testified that the police hypnotized him to improve his recollection. The prosecution asked the witness why he agreed to undergo hypnosis, and the court suggested to the witness that his motive was cooperative with law enforcement. (A11)

The court attempted to strengthen FBI agent Thomas Walzer's credibility on cross-examination after the defense cast doubt on the witness' statement that he was unfamiliar with the procedure of obtaining wire tap orders by establishing his prolonged length of service with the FBI. The court interrupted the cross-examination and answered for the witness, stating a period which was less than half the actual length of service. (A133)

Correction of the misstatement, highlighting the disparity between the court's recollection and the actual term, telegraphed the court's belief in the witness' credibility to the jury.

On numerous other occasions, the court came quickly to the aid of prosecution witnesses by testifying for them. In this way, the court prevented the possibility of witness contradiction and ruined the utility of defense cross-examination of witness Barry Mawn concerning information that Mr. Arocena allegedly provided against other members of Omega 7:

The Court paraphrased witness Mawn's testimony in a manner that removed all inconsistency. The court removed the pressure of cross-examination and the witness immediately accepted the aid, "(y)es, your Honor. Correct." (A43)

The Court removed the pressure from the cross-examination of Maximiliano Lora, and the witness immediately accepted the aid:

> Q: (Mr. Aguilar) So if he were to testify that he used those aliases, that is something –
>
> The Court: That you don't know anything about, is that right?
>
> The Witness: Right. (A103)

The court responded for witness John Hanghie:

> The Court: The witness said he did not know, but we will ask.
>
> Based on anything you knew or were told by Agent Wack or Mr. Arocena, or anyone else, do you know where they were coming from when they came to see you at 26 Federal Plaza?
>
> The Witness: No, I don't. (A38-39)

These examples demonstrate how the court strengthened the credibility of prosecution witnesses and weakened the effect of

defense cross-examination by actually testifying for the witnesses. In *United States v. Hickman*, 592 F.2d 931, 935 (6th Cir. 1979) a conviction was reversed where "immediately after (defense) counsel had finished (cross-examination), the district judge stepped in at once and rehabilitated the witness' testimony. In *Minor v. Harris*, 556 F. Supp. 1371, 1384 (S.D.N.Y. 1983) the state trial judge acted improperly "by coming quickly to the aid of prosecution witnesses during cross-examination,. . ." Neither may a court's involvement diminish the credibility of the defendant's witnesses. *United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983) (conviction reversed); *United States v. Sheldon*, 544 F.2d 213, 219 (5th Cir. 1976) (conviction reversed).

Evenhanded treatment of attorney objections and requiring both sides to frame examination properly indicates allowable judicial intervention. *United States v. Robinson*, 635 F.2d 1352, 1360 (6th Cir. 1984); *United States v. Martin*, 740 F.2d 1352, 1360 (6th Cir. 1984). In the present case, the defense and prosecution were improperly held to different standards. The court diminished the ability of the defense to prevent improper material from being presented to the jury by disregarding relevant objections. Instead of sustaining or overruling an objection, the court allowed all challenged material "subject to further connection." Defense counsel motioned to strike the entire testimony of prosecution witness, dentist Leon Schonberg. Although the court did not find the testimony relevant, it was admitted "subject to further connection." (A37)

This pattern continued with respect to the admission of numerous exhibits. The defense objected to the introduction into evidence of government's exhibits, all of which were admitted "subject to further connnection;" exhibits 655, 656 (A94); 657 (A95); 658 (A96); 659 (A98); 652, 652-A (A98); 654 (A99); 2078, 2078-A through E (A116); 2080, 2080-A through D (A119); 2079, 2079-A through C (A120); 2076, 2076-A through E (A121).

The court's contradictory instructions further demonsntrated how the defense was stripped of the power to meaningfully object. The court accepted these exhibits "subject to further connection" but directed the defense to "at an appropriate point move to strike."(A97) The "appropriate point" to challenge evidence is at the time of its offering, which defense counsel had attempted, and not at a nebulous juncture in the future. Fed. Rules Evid. Rule 103.

The court further prejudiced the defendant by disregarding its own conditional acceptance. The court referred to the exhibits at issue as items "in evidence." "I hand you one of the bullets. . .which is now in evidence." (A115) The court should have referred to the exhibits accurately, as items "in evidence subject to a motion to strike." Instead, the court implied that the jury should also disregard the conditional ruling, thus affording the exhibits greater evidentiary weight.

The court disregarded defense' chain of custody objections concerning the same items (A111). The record revealed that at least two of the exhibits had been tampered with. Witness George Kiszynski, called to identify exhibit 2077, testified that it was initialed by an unidentified source after the exhibit left his supervision. (A114) Similarly, government's exhibit 2078-E was also initialed by an unidentified source (A118) Yet, the defense' objections never received a ruling.

In contrast, the court denied equal latitude to the defense. The court did not permit the defense to present evidence "subject to further connection." When the prosecution objected to a portion of the direct examination of Mr. Arocena, the court forced the defense to immediately demonstrate relevance. (A154) The Prosecution objected to a portion of the cross-examination of Justo Rodriguez-Montenegro and the court sustained, stating "I don't think at this point it is relevant to the case, . . ." (A129) Yet, present relevance was the exact detail the court ignored when the prosecution presented its case.

At one point, the court even assumed the role of prosecutor by sustaining an objection that was never voiced. (A83)

> "Q. (Defense) And you went in. You didn't get a court order so you could have taken everything you saw there, right?
>
> A: (Witness) Well, actually—
>
> The Court: Sustained.
>
> Mr. Fernandez: (Defense) No objections.

The court should have maintained a neutral stance by issuing a curative instruction to defense's line of questioning but, instead,

assumed the prosecutorial role. Similarly, in *United States v. Hickman*, 592 F.2d 931, 934 (6th Cir. 1979), where conviction was reversed due to judicial misconduct, the court noted that the trial judge "would sua sponte interrupt a witness or counsel, with the words 'objection sustained' and then proceed to state why the witness' particular testimony was in some way objectionable."

On several occasions, the court increased the effectiveness of the prosecution's case by rephrasing government questions that were objectionable or awkward. During the direct examination of Robert Brandt, the prosecution posed an awkward question involving six different people. The witness' answer was unresponsive, and the court rephrased the question. (A40)

Yet when the defense posed a question that the witness did not understand, the court told the defense to rephrase it. (A21)

During examination of Charlene Heyer, the defense objected to a prosecution question and the court immediately rephrased the inquiry to satisfy form. (A24)

Similarly, prosecution witness Gerardo Necuse improperly testified by giving his opinion instead of testifying based on personal knowledge. The defense objected and the court rephrased the government's question in order that it would elicit a properly formed response.

> "Q: (Mr. Tabak) Do you know who continued to pay the rent?
>
> A: (Witness Necuse) In my opinion, in the beginning, was Eduardo Arocena.
>
> Mr. Aguilar: Objection, your Honor.
>
> The Court: Do you know that it was Arocena, of your own knowledge?
>
> The Witness: I know it was Arocena when I was living there." (A106-107)

Witness Necuse answered improperly again on p. 1683, ln. 14 and the court rephrased prosecution's inquiry, p. 1683, lns. 16-17.

Yet when the prosecution objected to the defense's examination, the court required counsel to rephrase on its own. "The Court:

Counsel is going to restate his question" (A108); "The Court: Sustained as to form." (A44, 110, 131); "The Court: Sustained" (A132).

This disparity of treatment, the court's deference to the prosecution substantively interfered with counsel's ability to conduct the defense. Further, it created the appearance of partisan judicial intervention.

The trial court interfered substantively with witness' testimony. On one occasion, the court instructed the jury to disregard admissible testimony that harmed the prosecution. Defense counsel sought to counteract an inference evoked during the direct examination of FBI agent James Lyons by establishing that Cubans inhabited a particular neighborhood. On cross-examination, the witness indeed testified that the area was predominantly Cuban. (A84-85)

Upon redirect, the prosecution attempted to rebut this testimony but, instead, reinforced the defense's position. (A86-87) Unable to elicit the desired testimony, the prosecutor, himself, contradicted the witness and announced ". . . in fact it (the neighborhood) is not Cuban." (A87) Upon this cue, the court instructed the jury that no testimony concerning the ethnic make-up of the area in controversy had been offered:

> It is now an open matter as to what the neighborhood around the Fruit King Market is. Unless further evidence is developed, that little area shall remain blank until filled in by some evidence. (A88)

In this instance, the court suppressed testimony favorable to the defense. The court also demonstrated partiality by issuing an instruction that served no proper administrative function but, simply cured the prosecution's discontent with testimony that its own witness had given.

The court attempted to substantiate the prosecution's claim that Mr. Arocena used assumed names. The prosecution alleged that the defendant was known as "Omar", the leader of anti-Castro organization Omega 7, and that he stored weapons illegally in a locker under the name, "A. Medina." During the direct examination of Maximiliano Lora, the court aligned itself with the prosecution by interjecting a question aimed at evoking substantive testimony to support this contention. (A102)

The court intervened in the direct examination of FBI agent George Kiszynski to help refute testimony elicited by the defense and substituting a "presumption" favorable for the prosecution. Kiszynski identified various government exhibits. The defense established that the witness did not know whether the weapon was operable. (A113)

Soon after the prosecution resumed examination, the court intervened and created the impression through generalized questioning that the weapon was, in fact, operable:

> "The Court: Agent Kiszynski, just for clarification, you have shown the various exhibits to the jury. Some of the jurors may not be familiar with the term 'clip'. Would you tell us what is a clip?
>
> The Witness: A clip is basically a container for rounds, and it feeds the rounds automatically into the rifle or handgun.
>
> The Court: In other words, you start with an empty clip and you have your rounds on the side?
>
> The Witness: Yes, sir.
>
> The Court: Then what is the next step in order to load the weapon?
>
> The Witness: Once you put the rounds into the clip, you insert the clip into the weapon.
>
> The Court: And then the weapon would presumably be ready to be fired?
>
> The Witness: Yes.
>
> The Court: Very well. (A122-123)

The Court's articulated reason for questioning the witness, to clarify the meaning of "clip", had been answered, (A122), yet the court continued until the prejudicial "presumption" had been established. (A123)

The court characterized evidence in a manner that prejudiced Arocena. Kiszynski referred to a government exhibit as a "belt with pouches," yet the court called the same item a "military belt." (A124)

Arocena had been charged with acts similar to those performed by the military. The court could have avoided the harmful association by demonstrating as much discretion as the witness, and referring to the exhibit as a "belt with pouches."

The court asked a series of questions aimed at cementing the prosecution's claim that the defendant rented a particular car on 9/12/81. During examination of prosecution witness National Car Rental Representative Charlene Heyer, the government introduced a car rental agreement with Arocena's credit card imprint. The prosecution, thereafter, referred to the person who rented the car as the defendant, Arocena. Defense counsel objected to this speculative leap and the court attempted to cement the association.

> "Q: (Mr. Tabak) After Mr. Arocena left with the second car did anything unusual happen?
>
> A: Yes –
>
> Mr. Aguilar: Your Honor, I am going to object to that question.
>
> The Court: After the man who gave his name as Eduardo Arocena left with the –
>
> Mr. Aguilar: Your Honor, there has been no testimony that anybody gave any name.
>
> The Court: She said he gave a name and it is on the contract... the name that appears on that contract is that the name the man gave you?
>
> The Witness: Yes. (A23-24)

The prosecution then finalized the prejudicial connection by stating that the man who rented the car was Eduardo Arocena (A25). She carefully referred to the renter as the "customer", and the "gentleman" (A23)(A22). It is strictly the province of the fact-finder to determine what inferences should be drawn from admitted evidence. *County Court of Ulster County, New York v. Allen*, 442, US 140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 791 (1979); *United States v. Shelton*, 736 F.2d 1397, 1402 (10th Cir. 1984) cert. denied 469 U.S. 857, 105 S.Ct. 185, habeas corpus granted 848 F.2d 1485 (10th Cir. 1988)

The court elicited testimony beneficial to the prosecution, destroying the effect of the cross-examination of prosecution witness, FBI

agent Wayne Tahn. Tahn testified concerning the death of Cuban diplomat Eulalio Negreu and on cross-examination, defense counsel emphasized the fact that the deceased was in possession of a .38 caliber weapon. The court then elicited new testimony that the weapon had not been fired.

> The Court: Had the weapon been fired or discharged?
>
> The Witness: No, sir, Through the investigation, he never had time even to pull it out. (A13)

The Court's strategically timed inquiry ruined the mood and effect of the defense counsel's cross-examination. The court could have more appropriately raised the issue during the direct examination when the testimony concerning the .38 caliber weapon was originally given. (A12) Further, the prosecution had ample opportunity to raise the matter but requested "(n)o redirect." (A13)

The court destroyed the effectiveness of the cross-examination of officer John Troy the prosecution witness testified about an explosion which occurred at 545 Fifth Avenue in New York City on 1/13/80, stating that he had chased a suspect. (A8-9) The defense on cross-examination, stressed the fact that, because of a difference in height, Mr. Arocena was not the suspect witness Troy chased. (A10) Thereafter, the court resumed the questioning as to the chronology of the explosion, replacing the focus of cross-examination with the sensational aspects of the witnesses testimony.

The court emphasized sensational aspects of witness testimony to the detriment of the defendant. The prosecution began examination of detective Kenneth Kuhn by asking for a description of his job duties and the court joined in. (A54)

In *United States v. Daniels*, 572 F.2d 535, 541 (5th Cir. 1978) the court held that a trial judge improperly intervened by questioning a witness DEA chemist generally about the "nature, source, and use of heroin," in a trial for possession of narcotics. The appeals court noted that the trial judge's intervention "had no relevance to the question of the defendant's guilt or innocence." *Id.* Similarly, in the case at bar, the trial judge's questioning about the duties

of a Crime Scene Detective were irrelevant as to the issue of guilt or innocence. In a case where the defendant has been charged with the commission of violent crimes, the trial court's emphasis of "blood" leads to a harmful association against the defendant. See *United States v. Bland*, 697 F.2d 262, 263 (8th Cir. 1983)

The court deferred to the government concerning an explanation of law, implying that the prosecution was the courtroom authority. In an explanation of contempt of court to the jury, the judge stated that the prosecution had corrected the court as to the maximum sentence for condemnors. (A46) The court could have avoided any prejudice by simply correcting its error without attribution to the prosecution. The jury would never have learned the source of the correction since the discussion was held at the side bar.

The court demonstrated official support by authenticating government evidence. For example, the court questioned a witness in order to establish that a document was made in the regular course of business, and to satisfy the chain of custody requirement (A91-93). In another instance, the court and prosecution traded authentication questions, implying that both parties were working together. (A111-112) Other examples of court sponsored authentication of government exhibits are set forth: (A52); A89-90); (A100-101); (A116-117); (A125-26). The court also mimicked methods of examination employed by the prosecution, implying that the parties were working together. As a part of the trial strategy, the prosecution introduced photographs into evidence and asked witnesses to "circle" certain areas for emphasis (A3) (A16) (A20) The court mimicked this tactic, requesting a witness to "circle" a specific area of government's exhibit (A17) On photographs depicting the scene of past explosions, the prosecution asked witnesses to identify the "seat" of the explosion. (A4-7) (A19) The court mimicked this tactic. (A18) The shared terminology created the appearance that the court and the prosectuion were operating as a single unit. The gratuitous authentication of exhibits signalled official support for the prosecution.

The court and the government pursued the same line of questioning, creating the appearance that both parties were operating as one. An illustrative example of this prejudicial interaction occurred during the direct examination of Stewart Nissenbaum. The

court intervened in the examination, adopting the same line of questioning as the prosecution. Upon completion of the court's inquiry, the prosecution interposed "no further questions" as if the entire examination was conducted by a single advocate, the government. (A35-36) (See also (A13-14).

In the present case, Arocena has assembled numerous and specific instances of partisan intervention, ranging from antagonism toward counsel to influencing the credibility of witnesses. In some instances, judicial involvement actually elicited substantive evidence harmful to the defendant, and *every* challenged remark was unnecessary and unconnected to any pertinent legal ruling. The comprehensive tone created an appearance of partiality and denied the defendant of his constitutional right to an impartial courtroom.

2. THE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HE DID NOT RECEIVE A FAIR TRIAL BECAUSE OF THE INEFFECTIVE ASSISTANCE OF COUNSEL.

The fundamental right to a fair trial includes the effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 835 (1985); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). A defendant is deprived of effective assistance if there is deficient performance and resulting prejudice to the defendant. *Id.* at 687; 2064; *United States v. Nersesian*, 824 F.2d 1294, 1320-21 (2nd Cir. 1987). A denial of effective assistance may result from the total performance of counsel or a single error. *Kimmelman v. Morrison*, 477 U.S. 365, 383-86, 106 S.Ct. 2574, 2587-89 (1986); *United States v. Cronic*, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 2046 n.20 (1984).

In the present case, the defense attorneys provided minimal assistance which resulted in extreme prejudice to defendant Arocena. Counsel's abbreviated defense consisted solely of calling the defendant to the witness stand and presenting a line of questioning which evoked a series of harmful and confusing responses. Further, defense counsel failed to conduct their presentation in accordance with the guideline they had outlined to the jury during the opening statement. Specifically and without explanation, counsel failed to call pre-selected witnesses on behalf of Mr. Arocena.

Finally, due to the severity of the charges that defendant was convicted of, the claim of ineffective assistance must be liberally construed. "(T)he seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." *Proffit v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982) cert. denied 464 U.S. 1002, 104 S.Ct. 508 (1983); *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981) cert. denied, 456 U.S. 949, 102 S.Ct. 2021 (1982).

A direct examination that harms the defendant is sufficient to demonstrate ineffective assistance of counsel. *Chandler v. Jones*, 813 F.2d 773, 781 (6th Cir. 1987); *Adams v. Balkcom*, 688 F.2d 734, 748 (11th Cir. 1982); *Washington v. Watkins*, 655 F.2d 1346, 1364 (5th Cir. 1981). The defense's examination of Mr. Arocena was so "ill-chosen" as to warrant a finding of deficient assistance.

During direct examination, defense counsel continually highlighted areas of the defendant's past that aided in substantiating the prosecution's case. The government claimed that the defendant used the assumed name "Alejandro Medina" to facilitate the commission of felonies. Defense counsel elicited testimony that the defendant, in fact, used the alias (A137) (152). The prosecution claimed that the defendant placed an underwater explosive device on the ship Ivan Shepetkov (see indictment-overt acts in support of count eight) and defense counsel elicited testimony that the defendant was trained in underwater demolition (A148). The prosecution claimed that the defendant was responsible for numerous and damaging explosions and defense counsel emphasized the defendant's expertise in all aspects of bomb production and demolition (A150). In essence the defense counsel helped in portraying Mr. Arocena as a trained terrorist, exactly the type of person capable of the crimes against which he was charged. Defense counsel elicited testimony indicating motives to commit anti-Castro crimes in general: that defendant was anti-communist (p.2121,lns.3-4); anti-Castro (A143-145); and that the Castro regime had executed many of defendant's companions (A145-146). The damaging testimony was not the result of an unexpected response or an isolated instance of poor judgment, rather a continuous pattern of questioning. (A148-151)

Defendant Arocena's sole theory of defense was based on a denial of any participation in the activities charged against him in the indictment; including denial of participation in bombings and

surveillance of foreign officials. Yet, entirely inconsistent with this strategy, defense counsel evoked testimony that fully developed Mr. Arocena's military training. (A148-50).

In addition, the defense pursued a line of questioning that evoked vague and confusing responses. According to Mr. Arocena, the Central Intelligence Agency was the source of this military-style training. Reference to the CIA could have added an air of respectability to his training by establishing formal United States government support. However, the defendant was precluded from raising the "CIA defense" by court order due to non-compliance with the Classified Information Procedures Act (A134-135). With this in mind, sound trial strategy should have avoided any reference to the defendant's military-style training because the source of instruction could not be clarified due to the court order. Unable to form the vital connection between the training and the CIA, the jury was left to wonder what "group" (A149) or "agents" (A148) were responsible for the instruction. This open-ended inquiry was extremely harmful because it created the appearance that the defendant was trained by an unsanctioned organization.

In *Chandler v. Jones*, 813 F.2d 773, 781 (6th Cir.1987) the Court found the trial attorney's performance deficient for "his inability to conduct proper direct examination," even though counsel was able "to get his complete theory of defense on the record." *Id.* at 782.

The performance of Mr. Arocena's counsel was more deficient than in *Chandler*. The preclusion of the CIA defense made it possible to get the complete theory of defense on the record. The decision to develop the defendant's military training, fully cognizant that the source of the training could not be adequately explained and would remain vague and confusing to the jury, demonstrated the defense's inability to conduct proper direct examination. (A160-162)

In addition, defense counsel's harmful line of questioning elicited answers that contradicted testimony Mr. Arocena gave before the grand jury. The prosecution brought up these contradictions to attack the defendant's credibility on cross-examination. (A160-62)

The sentencing court has excused any prejudice brought about by direct examination. The court reasoned that since counsel advised the defendant not to testify, the resulting harm must be borne by the defendant.

> ". . . Arocena's testimony at trial was the result of his own tactical decision to take the stand in his defense. Arocena's counsel specifically advised him not to testify, but this advise was rejected. Petitioner cannot now invoke the effects of that testimony as a ground for arguing that his counsel provided ineffective assistance, when they acted only at his discretion . . ." (A202-203)

The court has failed to draw a distinction between the decision to testify and the manner in which the examination was conducted. The scope and manner of examination was determined by counsel. Among the highly prejudicial material elicited by defense counsel was evidence detailing defendant's aliases, including "Alejandro Medina" (P2110-13) and his anti-Castro activities (P2118-2124). The transcript of the ex-parte in camera hearing does not demonstrate anything other than concerning that the defendant might commit perjury. The record demonstrates that counsel controlled the pace and nature of direct examination, therefore this serious allegation is unfounded. First, the fact that defense counsel requested the session demonstrated "good faith" and strongly indicated that they would allow the defendant to regulate questioning. Further, during the direct examination, counsel touched on many different areas, apparently changing subjects at their own discretion without any prompting from the defendant. Such instances demonstrate the ongoing thought processes of counsel and not the alleged "long arm control" of the defendant.

The failure to call pertinent witnesses indicates ineffective assistance of counsel. *Stanley v. Zant*, 697 F.2d 955, 966 (11th Cir. 1983); *United States v. Miller*, 643 F.2d 713, 714 (10th Cir. 1981). In the present case, defense attorneys failed to call any witnesses to testify on behalf of Mr. Arocena.

The United States Supreme Court has acknowledged the importance of character witness testimony in criminal proceedings. *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976). In *Proffit*, the court upheld a state capital-sentencing procedure as constitutional because it required the sentencing judge to weigh the mitigating factors with the focus on "the character of the individual defendant." *Id.* at 251, 1966.

In the opening statement, defense counsel pleged to call important witnesses such as the defendant's wife and previous attorney (A42). Yet, without explanation to the jury, neither person was called. The trial transcript indicates that the failure to call these, or any other witnesses, may have resulted from influence exerted by the trial judge. Before the defense had begun its case presentation, the judge expressed his belief in the defendant's guilt and urged that the trial be shortened (A72-76). Shortly thereafter, counsels presented their abbreviated defense, absent the support of any witnesses on behalf of the defendant.

It is reversible error not to call witnesses who would present the only defense available. *United States v. Miller* 643, F.2d 713, 714 (10th Cir. 1976); *United States v. Dingle* 546 F.2d 1378, 1385 (10th Cir. 1976). Similarly, in the present case, character evidence was material to support the only defense available.

In its simplest components, this case pitted the credibility law enforcement officers against the defendant. The prosecution attorneys first attempted to establish that certain events had occurred. Then, it attempted to bind these events to the defendant by offering testimony alleging that Mr. Arocena had confessed to a role in the commission of these acts. The harmful testimony was not offered by impartial witnesses but was elicited from FBI agents who had been at work on the investigation for up to nine years (A47). Further, no witnesses claimed to have seen the defendant commit any of the crimes against which he was charged. In response, the sole theory of defense was Mr. Arocena's denial of all charges. Due to the circumstantial nature of the prosecution's case which pitted the testimony of FBI agents against the denial of the defendant, credibility was a material issue at trial. In fact, the defendant's credibility was the "only defense available." This is not a situation where substantial evidence of good character had already been offered, mitigating the necessity for further cumulative testimony. *United States v. Miller*, 643 F.2d 713, 714 (10th Cir. 1981); *United States v. Sangemino*, 401 F.Supp. 903, 910 (S.D.N.Y. 1975). Rather, the complete failure to develop any character evidence contrary to a pledge in the opening statement, irrevocably harmed the defendant and demonstrated ineffective assistance of counsel.

In addition, the failure to supply character testimony indicates deficient case preparation. The failure to interview witnesses

supplies grounds for inadequate preparation, violative of the Sixth Amendment. *United States v. Tucker* 716 F.2d 576, 582-3 (9th Cir. 1983). *Baty v. Balkcom* 661 F.2d 391, 394-95 (5th Cir. 1981). In the present case, the trial transcript revealed numerous areas from which witnesses could have been chosen who would have corroborated Mr. Arocena's testimony by bolstering his credibility. Uncontroverted testimony established that the defendant was continuously employed since his arrival in the United States, yet no co-workers were called. Mr. Arocena was aided by Presbyterian church, yet no church members were called. Mr. Arocena was raising a family, yet no family members were called. There is nothing in the record indicative that character witnesses could not be located. Rather, the failure to supply such material testimony demonstrated inadequate case preparation.

The government's presentation consisted primarily of three elements. First, it established that certain events, mainly explosions had occurred. Next, the prosecution called a series of FBI agents to testify that the defendant had allegedly confessed to them. Finally, the prosecution introduced weapons stored in a warehouse rental unit, alleging that they belonged to the defendant. These elements did not establish that Mr. Arocena was guilty beyond a reasonable doubt and with effective assistance of counsel, he would have not been convicted. Not a single witness observed the defendant near the scene of these explosions.

In order to connect the defendant with the charges in the indictment, the government relied almost exclusively on witness' testimony that the defendant confessed. However, these witnesses were not impartial. They were all members of law enforcement who had been assigned to the current investigation for up to nine years. Proper cross-examination free from judicial interference would have significantly altered the weight afforded to this testimony. Further, if this testimony relating to the alleged confession was successfully suppressed from the prosecution's case would be conspicuously absent any evidence connecting the defendant with any unlawful activity.

The source of the physical evidence seized from the storage unit was under controversy. The storage unit was not rented under the name of the defendant, but under "A. Medina." Prosecution witness Gerardo Necuse testified that he used the alias "A. Medina." (A104-106) He also stated that he rented a locker at the warehouse

in question. (A109) To further strengthen the implication that witness Necuse rented the locker where the weapons were stored, the on-duty manager of the warehouse was unable to identify the defendant as a patron.

3. A TRIAL JUDGE SHOULD DISQUALIFY HIMSELF FROM DECIDING A 2255 MOTION WHEN HIS IMPARTIALITY HAS BEEN REASONABLY QUESTIONED BECAUSE OF PARTISAN INTERFERENCE IN THE TRIAL.

The objective standard set forth in subsection (a) is whether a member of the public knowing all of the facts of a particular case would believe that the judge's impartiality might reasonably be questioned. *United States v. Murphy*, 768 F.2d 1518, 1539-40 (7th Cir. 1985); *In re International Business Machines Corp.* 618 F.2d 923, 929 (2nd Cir. 1980); *United States v. Ferguson*, 550 F.Supp. 1256, 1260 (S.D.N.Y. 1982).

This standard requires mandatory recusal in situations where partiality is in fact present as well as where only the appearance of partiality is manifest. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986); *United States v. Ferguson*, 550 F.Supp. 1256, 1260 (S.D.N.Y. 1982) citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, 100 S.Ct. 1610, 1613 (1980). In the present case, judicial remarks demonstrated actual prejudice and created an atmosphere of partiality.

Remarks made in a judicial context are sufficient to provide a finding of bias under 28 USCS §455. *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986); *Ouachita National Bank v. TOSCO Corp.*, 686 F.2d 1291, 1300-01 (8th Cir. 1982); *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979).

For example, in *Webbe v. McGhie Land Title Company*, 549 F.2d 1358, 1361 (10th Cir. 1977), the trial judge, based upon the plaintiff's oral argument and before the defense had addressed the court, stated that the defendant was "stuck". Due to this remark, the appellate court disqualified the trial judge under 28 USC §455 from hearing the case on remand. *Id.* at 1361.

Statements issued by a trial judge in the present action demonstrate a higher degree of partiality than in *McGhie Land Title Company*. Similarly, based on the prosecution's argument and

before the defense had begun its presentation, the judge commented that the defendant was guilty. However, in addition, the remarks were issued in conjunction with a suggestion to "shorten" the remainder of the trial. (See Point I of brief).

It is not legally notable whether the remarks were issued "outside the presence of the jury". The purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety." *Hardy v. United States*, No. 89-2008, slip. op. at 4369 (2nd Cir. June 30, 1989). The challenged remarks were issued after the government had been allowed to conduct its case freely for two weeks, had already called sixty witnesses, but before the defense had even commenced its presentation.

The sentencing court implied in the opinion that a subsequent self-reprimand in the presence of counsel, diminished the weight of its earlier remarks. (A197)

These remarks did not mention or in any way retract the earlier statement of official belief in the guilt of defendant therefore, it did not dilute the appearance of prejudice. Further, it does not seem reasonable that the general remarks issued to both sides, could have erased defense's doubts. The Court's peculiar admonition that "matters are pretty clear now" and "he (Arocena) will have to deal with a problem that he created" so the defense might as well shorten its case—was far more forceful.

The preceding trial excerpt demonstrated actual bias against the defendant and created an atmosphere of partiality. Any reasonable person with knowledge of the foregoing would question the trial judge's impartiality.

In *Roberts v. Bailar*, 625 F.2d 125, 127 (6th Cir. 1980) the trial judge was required to withdraw because of statements favoring the defendant issued during the pretrial hearing. The judge stated that the defendant was an "honorable man" who would "never intentionally discriminate." *Id.* Judicial remarks concerning a party's innocence are no less offensive than the present comments concerning guilt. Both demonstrate partisanship in fact and appearance.

In contrast, judicial statements that did not warrant recusal, did not deal with the alleged culpabilty of any party. For example, in an appeal from conviction of "white collar" crimes, appellants moved to disqualify the judge on the basis of certain comments he

made concerning co-defendants. In denying the motion, the Court of Appeals for the 2nd Circuit reasoned that none of the remarks "relate to guilt or innocence of these appellants and were simply responses to the explanations or pleas for clemency of those pleading guilty or being sentenced." *United States v. Bernstein*, 533 F.2d 775 at 785, nt 5 (2nd Cir. 1976). The present comments were not issued in conjunction with any pertinent legal ruling. Further, the extra-judicial statement directly related to the alleged guilt of the defendant.

28 USC §455 contains two subsections under which the standard for recusal differs. Subsection (b) (1) states that the judge should disqualify himself "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings. . . ." The term "personal" was carried over from 28 USC §144 when section 455 was amended in 1974. *United States v. Coven*, 662 F.2d 162, 167-8 (2nd Cir. 1981); *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975). 28 USC §144, contains similar language.

The United States Supreme Court interpreted "personal" to mean "extrajudicial." *United States v. Grinnel Corp.* 384 U.S. 563 at 583, 86 S.Ct. 1698 at 1710 (1966). Other cases followed *Grinnel*; *United States v. Sclafani*, 487 F.2d 245 (2nd Cir. 1974) cert. denied, 414 U.S. 1023, 94 S.Ct. 445 (1973); *Wolfson v. Palmieri*, 396 F.2d 121 (2nd Cir. 1968).

A finding of bias sufficient to warrant recusal under §455(a) can originate entirely within the judicial context. *United States v. Coven*, 662 F.2d 162, 168 (2nd Cir. 1981) cert denied 456 US 916, 102 S.Ct. 1771; *United States v. Wolfson*, 558 F.2d 59, 63 (2nd Cir. 1977).

Other jurisdiction have similarly ruled that the bias requirement of §455(a) can be satisfied solely from judicial participation in the courtroom. *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987); *United States v. Cepeda Penes*, 577 F.2d 754, 758 (7th Cir. 1978); *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979); *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975); *Ouachita National Bank v. TOSCO Bank Corp.* 686 F.2d 1291, 1300-01 (8th Cir. 1982); *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) cert. denied 109 S.Ct. 864; *Webb v. McGhie Land Title Company*, 549 F.2d 1358, 1361 (10th Cir. 1977); *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986).

Finally, the trial court stated that recusal was improper because it would defeat "the statutory scheme for challenges to federal sentences which expressly provides for review by the sentencing court in the first instance." (A198) The petitioner does not attempt to challenge the statutory scheme, 28 USC 2255 does not so narrowly equate the sentencing court with the sentencing judge.

Prior to the enactment of section 2255, a habeas corpus petitioner was forced to file in the district of confinement. *United States v. Addonizio*, 442 US 178, 185 99 S.Ct. 2235, 2240, 60 L.Ed 2d 805, 811 (1979); *United States v. Hayman*, 342 U.S. 205, 213, 72 S.Ct. 263, 269, 96 L.Ed 232, 238 (1952). Serious practical problems resulted "by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district.[18]" (footnote omitted) *United States v. Hayman*, 342, US 205, 213-214, 72 S.Ct. 263, 269, 96 L.Ed. 232, 239 (1952). The statutory purpose behind the enactment of §2255 was to transfer the hearing to the more convenient forum of the sentencing court *United States v. Addonizio*, 442 US 178, 185, 99 S.Ct. 2235, 2240, 60 L.Ed.2d 805, 811 (1979), specifically to be closer to the scene, the witnesses and the records. *United States v. Hayman*, 342 U.S. 205, 213-214, 72 S.Ct. 263, 269, 96 L.Ed. 232, 239 (1952). The petitioner has satisfied these two conditions by filing this motion in the Southern District.

CONCLUSION

Based on the foregoing this court should grant certiorari to review the decision of the United States Court of Appeals for the Second Circuit

Respectfully submitted,

BY: _____

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March, one thousand nine hundred and ninety.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.
HONORABLE MICHAEL B. MUKASEY,
District Judge.*

EDUARDO AROCENA
Petitioner-Appellant,

v. 89-2430

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER

Eduardo Arocena appeals from a September 13, 1989, order of the District Court for the Southern District of New York (Robert J. Ward, Judge) denying his 28 U.S.C. § 2255 petition to vacate his conviction and also denying his related 28 U.S.C. § 455(a) recusal motion. With respect to the section 2255 petition, Arocena contends that the trial judge improperly interfered with the trial and displayed bias against him. He also contends that he was denied effective assistance of counsel. With respect

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* Of the District Court for the Southern District of New York, sitting by designation.

to the section 455(a) motion, Arocena maintains that the alleged interference and bias of the district judge required the judge to disqualify himself from consideration of Arocena's habeas petition because his "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). We affirm.

Petitioner's recusal motion was based entirely on actions allegedly taken by Judge Ward during the course of Arocena's trial. Our cases establish that lack of any allegation of extrajudicial bias "is relevant [if not dispositive] to an analysis of the appearance of impartiality." *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). This is particularly so when the alleged grounds for disqualification are no broader than those specified in section 455(b)(1), *see Apple v. Jewish Hosp. & Medical Center*, 829 F.2d 326 (2d Cir. 1987).

Much of petitioner's brief consists of references to questions asked or comments made by the trial judge that allegedly placed the judge in a prosecutorial rather than neutral role. After reviewing each of these claims, we find that the trial excerpts cited in petitioner's brief, read in context, reveal only appropriate efforts to clarify matters for the jury or to expedite lengthy presentations of testimony. The Court's comments to counsel in the course of discussing the RICO count merely reflect an effort to persuade the Government to reconsider consuming substantial court time in pursuing additional counts in the complaint. These commentsa were made outside the presence of the jury, and there is no support for petitioner's claim that they caused him to present an abbreviated defense.

Petitioner's claim that he was denied effective assistance of counsel falls far short of the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). First, petitioner has failed to show deficiency in the way his counsel conducted trial. From the record, it appears quite plausible that counsel's departure from the strategy outlined in his opening statement was a considered response to the prospect of false testimony by his client. The decision to elicit Arocena's military training on direct examination and not to call character witnesses might reflect an

effort to have the jury consider patriotism as a possible mitigation. Second, on this record, we can hardly find that these alleged deficiencies "undermine confidence in the outcome." 466 U.S. at 694. As we stated in ruling on petitioner's direct appeal, the Government's case against Arocena was "overwhelming and impressive," *United States v. Arocena*, 778 F.2d 943, 950 (2d Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986). Supporting Arocena's conviction on twenty-five counts was the testimony of eighty-five Government witnesses, including four criminal associates; tape-recorded conversations between Arocena and an FBI agent; and physical and forensic evidence found in Arocena's apartment and a storage locker he had rented. There is no reasonable probability that learning of Arocena's military training and not hearing from a few character witnesses in defendant's favor (if they were indeed available) caused the jury to reach a verdict different than it otherwise would have.

The order of the District Court is affirmed.

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Circuit Judges.

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District Judge.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDUARDO AROCENA,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

OPINION

89 Civ. 1122 (RJW)

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WARD, District Judge.

Petitioner, Eduardo Arocena, moves pursuant to 28 U.S.C. §2255 to vacate the conviction and sentence imposed upon him on the grounds that he was denied (1) due process of law by partisan judicial interference during his trial and (2) a fair trial due to ineffective assistance of counsel. Petitioner also moves, pursuant to 28 U.S.C §455(a), for the Court to disqualify itself from considering the section 2255 motion. For the reasons that follow, the motion to disqualify the Court and the motion to vacate the conviction and sentence are denied.

BACKGROUND

Petitioner, the leader of a terrorist organization known as "Omega 7", was convicted on September 22, 1984, after a six week jury trial, on the following charges: first degree murder of a diplomat; two counts of conspiracy to murder diplomats; attempted murder of a diplomat; conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act (RICO); interstate transportation of explosives with intent to cause injury; three counts of malicious damage by explosives to property used in commerce with personal injury resulting; malicious damage by explosives to property used in commerce; placing a destructive substance near an aircraft or air terminal; unlicensed interstate transportation of explosives; six counts of possession of unregistered bombs; four counts of destruction of property within the United States used by foreign governments; conspiracy to, *inter alia*, use explosives to commit felonies; conspiracy to knowingly make false material declarations under oath before a grand jury and obstruct the administration of justice; and perjury before a grand jury.

On November 9, 1984, petitioner was sentenced to serve consecutive sentences of life imprisonment and thirty-five years imprisonment by this Court.[1] The conviction was upheld by the

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[1] Arocena was subsequently tried and convicted in the Southern District of Florida on other charges and was sentenced to an aggregate of twenty years imprisonment, consecutive to the sentence imposed by this Court.

Court of Appeals for the Second Circuit in *United States v. Arocena*, 778 F.2d 943, 944 (2d Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986), and Arocena's grounds for appeal were found to be "entirely devoid of merit."[2] The Second Circuit concluded that:

> Overall, the Government's case against Eduardo Arocena was overwhelming and impressive. Arocena's interviews with FBI agents and his lengthy taped conversations with Agent Wack, combined with the copious physical evidence against him and the testimony of eighty-five witnesses, piece together the details of a terrorist campaign shocking in its ferocity and persistence.

Id. at 950.[3]

DISCUSSION

Preliminarily, the Court must address petitioner's motion that the Court disqualify itself from deciding the motion to vacate his conviction and sentence. Petitioner asserts that disqualification is appropriate under 28 U.S.C §455(a) which provides that:

> any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety. *Hardy v. United States*, No. 89-2008, slip. op. at 4369 (2d Cir. June 30, 1989). The standard used to determine if recusal is appropriate under section 455 is an objective one. *E.g. In re Int'l Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980). Recusal is warranted if a reasonable person, knowing all the facts, would conclude that the court's impartiality might reasonably be questioned. *See Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987).

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[2] Familiarity with the Second Circuit's opinion in *Arocena* is presumed.

[3] In *Arocena*, the Second Circuit highlighted the nature and extent of the criminal activities of petitioner based on the voluminous evidence produced at trial. *United Sttes v. Arocena*, 778 F.2d at 944-48. The Court will not repeat the sordid details in this decision.

Section 455(a) provides grounds for disqualification than the recusal provisions contained in 28 U.S.C §§ 144 and 455(b)(1)*, but "[w]hen, as here, a party has not alleged any grounds for recusal other than those relating to the district court's alleged bias or prejudice [which arose from the proceedings in court], those broader grounds are not implicated." *Id.*

Accordingly, section 455(a) requires that the source of the alleged judicial bias or prejudice originate outside the judicial context. *In re Int'l Business Machines Corp., supra*, 618 F.2d at 929.

> We conclude that under section 455(a) the bias to be established must be extrajudicial and not based upon in-court rulings. . . . [T]he bias which requires recusal must be personal and cannot rest upon trial court rulings or conduct. . . .

Id. See also United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980) (§455(a) does not provide grounds for recusal based on allegations of bias or prejudice stemming from district judge's courtroom remarks); *Markus v. United States*, 545 F .Supp. 998, 999 (S.D.N.Y. 1982) (alleged bias sufficient for recusal must arise by virtue of some factor that occurs outside the events in the trial itself), *aff'd without opinion*, 742 F.2d 1444 (2d Cir. 1983).

Petitioner does not assert that the Court's alleged bias arose from an extrajudicial source. Instead, without mentioning the above authority, petitioner argues that section 455(a) provides for recusal based solely on allegations of bias and prejudice arising from conduct in the trial setting. Petitioner relies on cases

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* Section 144 prescribes recusal when a party files a "timely and sufficient affidavit" indicating the judge has "a personal bias or prejudice" against the moving party or in favor of an adverse party. 28 U.S.C. § 144. Section 455(b)(1) provides that a judge should disqualify himself or herself in any proceeding where he or she has "a personal bias or prejudice concerning a party." 28 U.S.C. §455(b)(1). Both provisions are construed in the same manner and require the basis of the alleged bias or prejudice to emanate from an extrajudicial source, not conduct which arises in the judicial context. *Apple v. Jewish Hospital and Medical Center, supra*, 829 F.2d at 333. Petitioner concedes that disqualification under either 28 U.S.C. §§ 144 or 455(b)(1) is inappropriate because there is no allegation of an extrajudicial source of bias or prejudice.

outside this circuit which identify the general rule that bias or prejudice sufficient to disqualify a judge must arise from extrajudicial sources, but go on to state a limited exception to this rule when a judge's remarks demonstrate such pervasive bias or prejudice that it constitutes bias against a party. *See Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986) (citing *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Quachita National Bank v. TOSCO Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982) *aff'd in part on rehearing en banc*, 716 F.2d 485 (1983); *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979).[5]

The Court, in keeping with the spirit of section 455(a), and out of its own belief in the seriousness of a charge of partiality, has endeavored to examine the substance of the disqualification motion despite the absence of allegations that any bias or prejudice arose from an extrajudicial source. After reviewing petitioner's argument, the Court concludes that the motion for disqualification is utterly without merit.

Petitioner relies on a short excerpt from the six week trial to support his claim that the Court's impartiality in deciding the section 2255 motion might reasonably be questioned. Trial Transcript ("Tr.") at 1111-12, 1114-15. Petitioner argues that a comment by the Court indicated a view as to Arocena's guilt during the course of the trial. Petitioner, quoting selectively from the transcript, fails to provide any context for the quoted colloquy between the Court and counsel, thereby conveniently ignoring the fact that these comments occurred: (1) outside the presence of the jury, (2) during the course of the Government's

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[5] At no time does petitioner mention the general rule enunciated in these cases concerning the need for allegataions of bias or prejudice to be based on extrajudicial sources, or the limited nature of the exception to this rule.

The Second Circuit, in discussing recusal under section 441(b)(1), noted that while "conduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party, the fact is that no case in this circuit has ever found such bias on the basis of a trial court's rulings or conduct. This reticence . . . is well justified." *In re International Business Machine Corp.*, *supra*, 618 F.2d at 928 n. 6.

presentation of its case in chief, (3) at the end of a short trial day, approximately two weeks into the trial which lasted six weeks and consumed almost two thousand eight hundred (2800) pages of transcript, (4) during a discussion of scheduling matters for the Government's remaining witnesses, and (4) in the context of a suggestion by the Court that the Government might want to shorten its presentation of proof. Tr. 1093-1115. Moreover, petitioner fails to acknowledge that the exchange he cites between the Court and counsel was immediately followed by an explanation from the Court that it was not attempting to substitute its judgment for that of the jury, but only to preside fairly in the case and encourage the parties to continue as expeditiously as they felt was proper. Tr. 1115. The Court finds no reasonable construction of these comments which could indicate a bias against petitioner such as to bring the Court's impartiality into question in deciding the section 2255 motion.

One other point is worth noting in analyzing the recusal request on petitioner's section 2255 motion. The determination of the motion to disqualify is necessarily interrelated with the merits of petitioner's allegation that he was denied due process and a fair trial due to partisan interference by the Court. Part of petitioner's challenge to his conviction and sentence requires the Court to review its own actions to determine if a constitutional violation occurred. This review, in and of itself, is perfectly appropriate, and does not impugn the Court's impartiality in contravention of section 455)(a). *See e.g., Gravenmier v. United States*, 469 F.2d 66, 69 (9th Cir. 1972) (it is well established that the trial judge can hear and decide a motion pursuant to 28 U.S.C. §2255 even when the section 2255 motion is based on a claim that the trial judge should have disqualified himself from presiding over the trial); *Walters v. United States*, 404 F. Supp. 996, 997-998 (S.D.N.Y. 1975). Furthermore, the bare allegation by a petitioner of partiality by the Court in a section 2255 motion cannot have the effect of eviscerating the statutory scheme for challenges to federal sentences which expressly provides for review by the sentencing court in the first instance. 28 U.S.C § 2255.

Accordingly, recusal is not warranted in these circumstances under any reading of section 455(a) and the motion to disqualify

the Court from considering the section 2255 claim is denied. The Court now turns to the merits of petitioner's section 2255 motion.

A. *28 U.S.C. § 2255*

Section 2255 provides a mechanism for federal prisoners to vacate convictions and sentences imposed in violation of the laws and Constitution of the United States. *See Hardy v. United States*, No. 89-2008, slip. op. at 4370 (2d Cir. June 30, 1989).

> Generally, relief is available under section 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes "a fundamental defect which inherently results in a complete miscarriage of justice."

Id. (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1975) (quotation omitted)). In support of his section 2255 motion, petitioner asserts that he was denied due process of law by alleged partisan judicial interference at trial and that he was denied a fair trial because of inadequate assistance of counsel.

1. *Partisan Judicial Interference:*

Petitioner argues that the Court's questioning of certain witnesses, including Arocena, favored the Government. This claim is meritless. The Court has an active responsibility to ensure that the issues at trial are clearly presented to the jury and therefore a duty to participate in the questioning of witnesses to the extent necessary to clarify their testimony. *See United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987); *United States v. Pisani*, 773 F.2d 387, 403 (2d Cir. 1985); *United States v. Robinson*, 635 F.2d 981, 986 (2d Cir. 1980) *cert. denied*, 451 U.S. 992 (1981). Petitioner has pieced together several instances where the Court asked questions of witnesses, none of which, in the Court's view, present any indication of favoritism by the Court toward the Government, or partisan interference with the trial.

Instead, each of the passages cited by petitioner, which the Court notes were once again incompletely and misleadingly set forth in petitioner's motion papers, reflect the Court's duty to clarify vague, ambiguous, or confusing testimony. Furthermore, after the Court's limited questioning of Arocena, the Court instructed the jury as follows:

> Incidentally, ladies and gentlemen, I would like to instruct you that the questions asked by the Court are asked for clarification. They do not mean and they should not mean to you that I take a position one way or another.

Tr. at 2442.

Similarly, the Court's statement to counsel outside the presence of the jury upon which petitioner based his recusal motion, and petitioner's accusations that the Court treated trial counsel unfairly and bolstered the testimony of the Government's witnesses, have no foundation in the record and are wholly inadequate to support a claim that petitioner's constitutional rights were violated.

Furthermore, in reviewing a claim of judicial misconduct the court must determine wether the trial judge's behavior was so prejudicial that it denied defendant a fair, as opposed to a perfect, trial. *United States v. Gurary*, 860 F.2d 521, 527 (2d Cir. 1988), *cert. denied*. 190 S.Ct. 1931 (1989). In view of the abundant evidence of Arocena's overwhelming guilt, *United States v. Arocena*, *supra*, 778 F.2d at 950, the effect of any statements by the Court, or the questioning of witnesses by the Court, was at most harmless and constituted insufficient prejudice to amount to a constitutional violation. *See United States v. Robinson*, *supra*, 635 F.2d at 986; *United States v. Boatner*, 478 F.2d 737, 742 (2d Cir.) *cert. denied*, 414 U.S. 848 (1973). Accordingly, petitioner is not entitled to any relief under section 2255 on the ground of partisan judicial interference with his trial.

B. *Ineffective Assistance of Counsel:*

The Supreme Court has articulated a two-part standard for evaluating claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Stricklan v. Washington, 466 U.S. 668, 687 (1984).

Judicial scrutiny of trial counsel's performance is highly deferential and there is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* at 689. "The defendant must overcome the presumption that, under the circumstance, the challenged action 'might be considered sound trial strategy.' " Id. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Furthermore,

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable.

Id. at 691.

"The benchmark for judging any claim of ineffective assistance us be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. If petitioner

cannot make an adequate showing of actual prejudice to satisfy the second prong of the *Strickland* test, this Court need not even inquire into the adequacy of counsel's conduct. *Id.* at 697.

Petitioner propounds three instances which he claims constituted ineffective assistance of counsel: (1) counsel's direct examination of Arocena, (2) counsel's alleged failure to file a motion to suppress Arocena's confession, and (3) counsel's failure to call other witnesses, aside from Arocena, on his behalf. Each of these arguments is factually disingenuous and legally untenable. Moreover, none of the alleged misconduct by counsel could have resulted in constitutional prejudice to petitioner given the overwhelming evidence of his guilt.

Arocena's testimony at trial was the result of his own tactical decision to take the stand in his defense. Arocena's counsel specifically advised him not to testify, but this advice was rejected.[6] Petitioner cannot now invoke the effects of that testimony as a ground for arguing that his counsel provided ineffective assistance, when they acted only at his direction. In addition, the questions asked of Arocena on his direct examination fell well within the permissible range of deference to be afforded trial counsel's actions, given Arocena's determination to testify against his counsel's advice.

Petitioner's claim that counsel did not file a motion to suppress his confession is belied by the record. Such a motion was filed prior to trial, but Arocena refused to admit that he had made any confession. Transcript of Hearing held July 11, 1984 at 23-24, 29, 31-32 ("Tr. July 11, 1984"). Therefore, defense counsel could not continue to argue for its suppression and the motion was denied by the Court. Tr. July 11, 1984 at 31-33. Trial

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[6] Fearful that Araocena intended to give perjured testimony and unable to dissuade him from taking the stand, trial counsel for Arocena put their concerns on the record in an *ex parte, in camera* conference with the Court on September 10, 1984. The transcript of this proceeding was sealed at the time, but was opened by Order dated April 4, 1989, following the filing of petitioner's section 2255 motion. Petitioner has not challenged the action of defense counsel in requesting this *ex parte* session with the Court.

counsel's actions were hardly unreasonable under prevailing professional norms given the totality of the circumstances. Furthermore, petitioner has offered no credible argument that a suppression motion would have been successful or, if successful, that it would have altered the outcome of the trial, both necessary elements for an ineffective assistance of counsel claim based on the failure to file such a motion. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986).

Finally, petitioner's challenge to defense counsel's failure to call witnesses other than Arocena must fail. The decision whether to call any witnesses on behalf of a defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial. *United States v. Neresian*, 824 F.2d 1294, 1321 (2d Cir.), *cert. denied*, 108 S.Ct. (1987). If the decision is reasonably made, it will not constitute a basis for an ineffective assistance claim. *Id.* Petitioner has failed to advance a persuasive argument that trial counsel's decision not to call additional witnesses was unreasonable or that this decision can be construed as conduct outside the wide range of professional representation. In addition, petitioner does not explain how any witnesses he now asserts defense counsel should have called at trial could have affected the result of the trial, given the overwhelming evidence of his guilt.

Indeed, it is the overwhelming nature of the evidence of Arocena's guilt adduced at trial which precludes all of petitioner's arguments that the alleged instances of misconduct by trial counsel resulted in prejudice sufficient to constitute a constitutional violation. There is no substance to petitioner's ineffective assistance of counsel claim. The motion under section 2255 must, therefore, be denied.

CONCLUSION

The Court finds there is no merit to petitioner's recusal motion under section 455(a) or his motion to vacate his conviction and sentence under section 2255. Accordingly, both motions are denied.

It is so ordered.

Dated: New York, New York
September 12, 1989

/s/Robert J. Ward
U.S.D.J.

APPENDIX C

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.